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No. 95-992

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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MOTION TO AFFIRM

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MOTION TO AFFIRM

Appellees, the National Association of Broadcasters (NAB) and the Association of Independent Television Stations, Inc. (INTV), respectfully move this Court to affirm the judgment of the three-judge district court upholding the constitutionality of the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the Act), 47 U.S.C. §§ 534, 535 which require operators of cable television systems to carry the signals of a limited number of local broadcast television stations.

STATEMENT

1. The must-carry provisions were enacted in 1992 as part of a sweeping congressional reform of the regulatory structure governing the cable industry. These reforms

responded to cable's dominance of the video programming market, its rapid vertical and horizontal concentration, and its increasing economic incentives to act in ways that could threaten substantial numbers of local broadcast television stations.

Congress determined that over time these developments would jeopardize the vigor and diversity of the system of free over-the-air broadcast television, on which the 40 percent of American households without cable depend for video information. Broadcasters had been excluded from cable systems with increasing frequency during the years preceding passage of the Act, and Congress predicted "a substantial likelihood that . . . additional local broadcast signals will be deleted, repositioned or not carried." (Statutory findings, ¶ 15, Pub. L. No. 102-385, § 2(a)(15)). Congress believed that trend would substantially impair the quality and quantity of broadcast television by cutting many broadcasters off from most of their potential audience, thereby threatening the advertising revenues on which broadcasters rely and substantially impairing their ability to serve the needs of noncable households.

Congress specifically sought to *maintain* present levels of broadcast diversity for noncable households. Congress recognized the importance of not only mainstream broadcast programming of the network affiliates but also specialized programming, such as programming developed to serve Chinese speakers in San Francisco or the Cuban emigre community in Miami, religious programming, educational programming, and other programming fulfilling specific needs that network affiliates do not serve.

2. Appellants filed a First Amendment challenge to the must-carry provisions before a three-judge court convened pursuant to Section 23 of the Act (47 U.S.C. § 555(c)(1)). The court upheld must-carry, with Judge Williams dissenting. *Turner Broadcasting System, Inc. v. FCC*, 819 F. Supp. 32 (D.D.C. 1993). On appeal to this Court, appellants contended that must-carry should be subjected to, and could not survive, strict scrutiny.

The Court rejected appellants' plea, holding that "the appropriate standard by which to evaluate the constitutionality of must-carry is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech." *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2469 (1994).[1] The Court explained that "[t]he design and operation of the challenged provisions confirm that the purposes underlying the enactment of the must-carry scheme are unrelated to the content of speech." 114 S. Ct. at 2461. In particular, the provisions "do not require or prohibit the carriage of particular ideas or points of view"; "do not penalize cable operators or programmers because of the content of their programming"; "do not compel cable operators to affirm points of view with which they disagree"; "do not produce any net decrease in the amount of available speech"; and "leave cable operators free to carry whatever programming they wish on all channels not subject to the must-carry requirements." *Id.* at 2462.

The Court then held that the content-neutral interests Congress identified were of great importance. The Court acknowledged that "Congress' overriding objective in enacting must-carry" was "to preserve access to free television programming for the 40 percent of American households without cable," 114 S. Ct. at 2461, and that "Congress sought to *preserve the existing structure* of the Nation's broadcast television medium," *id.* at 2464 (emphasis added), and to "maintain[] local broadcasting," *id.* at 2469, to ensure that noncable households continue to have access to "a multiplicity of information sources." *Id.* at 2470. That interest, the Court made clear, is "of the highest order," for "it has long been a basic tenet of national

[1] The Jurisdictional Statement repeatedly describes the Court's opinion as a plurality. However, because Justice Stevens, while concurring, would have gone further than the "plurality," and would have upheld the statute on the basis of the record then before this Court, the views appellants characterize as those of the plurality effectively commanded a majority of the Court.

communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Id.* at 2470 (quotations omitted). The Court also recognized the importance of Congress' related interest in preventing predatory conduct by cable systems. *Id.* at 2490.

The Court decided, however, that "[o]n the state of the record developed thus far, and in the absence of findings of fact from the District Court," it was unable to make a final decision under *United States v. O'Brien*, 391 U.S. 367 (1968), whether must-carry furthered these substantial interests in a reasonably tailored manner. 114 S. Ct. at 2470.[2] The Court therefore remanded, with careful instructions to focus on the following questions:

- Whether, absent must-carry, "*significant numbers* of broadcast stations will be refused carriage on cable systems";
- Whether "broadcasters *so affected* would suffer financial difficulties as a result," or "would be at serious risk of financial difficulty," or would "either deteriorate to a substantial degree or fail altogether";
- Whether the "actual effects of must-carry" imposed substantial burdens on cable operators and programmers, specifically the "extent to which cable operators will, *in fact*, be *forced* to make *changes*" in their program selections, and "the degree to which cable programmers will be *dropped* from cable systems to make room for local broadcasters;"
- Whether less restrictive alternatives could serve Congress' purposes as "*effectively*" as must carry.

114 S. Ct. at 2469, 2471-72 (emphasis added).

[2] Thus, contrary to appellants' suggestions, the Court did not hold that appellees had failed to meet their burden of justifying the law under *O'Brien* (*see* J.S. at 3). The Court merely deferred consideration of that question pending additional evidentiary development and/or judicial findings.

The Court made clear that the issue on remand was not whether Congress' judgments were correct, but whether they were reasonable. The district court was simply to satisfy itself that "Congress has drawn reasonable inferences based on substantial evidence." 114 S. Ct. at 2471. In doing so, it was to extend "substantial deference to the predictive judgments of Congress" because "[a]s an institution, [] Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon an issue as complex and dynamic as that presented here." 114 S. Ct. at 2471 (quoting *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985)). The Court stressed that the judiciary's duty to exercise "independent judgment" in applying *O'Brien* "is not a license to reweigh the evidence *de novo* or to replace Congress' factual predictions with [its] own." *Id.*

3. The remand proceedings were massive in scope. The parties produced hundreds of thousands of documents during discovery. Appellants subpoenaed documents from hundreds of nonparty broadcast television stations and employees, deposed dozens of witnesses, and served hundreds of pages of interrogatories and requests for admission. Every aspect of the record before Congress was subjected to searching (indeed unprecedented) scrutiny. Over 1,000 pages of legal briefs and more than 100,000 pages of evidence were submitted in support of the parties' cross-motions for summary judgment.

a. On the basis of that record, the district court upheld must-carry. Judge Sporkin's opinion for the court considered each of the specific questions identified in this Court's opinion, and found the congressional judgments on these questions amply supported.

* *Whether, absent must-carry, "significant number of broadcast stations will be refused carriage on cable systems"?*

The court held that the record contained substantial evidence from which Congress could reasonably have inferred that significant numbers of local broadcast stations would be refused cable carriage absent must-carry. The court found ample evidence that the market created strong incentives for cable operators to discriminate against broadcasters. J.S. App. 10a-11a.

The court also found substantial evidence that cable operators had acted, and would continue to act, on these incentives, including:

- The FCC's 1988 carriage survey, which indicated significant numbers of stations being refused carriage, and an expert analysis of that study which confirmed that these refusals were of significant duration and that the FCC study substantially understated the total number of adverse carriage actions during 1988;[3]
- Estimates by *appellants*' expert that in 1992 local broadcasters were not carried by cable operators between 19 and 31 percent of the time, that noncarriage for UHF independent stations was approximately 40 percent, and noncarriage for noncommercial stations was 22 percent;[4]
- A reanalysis of appellants' data by appellees' expert indicating that noncarriage of local independent stations was approximately 47 percent;[5]
- Expert analysis showing that broadcast licensees entering the market after the FCC's must-carry requirements were struck down in 1985 were able to obtain carriage only 50 percent of the time;[6]

[3] Defendants' Additional Evidence (DAE) Vol. II.A, Meek Decl. at ¶¶ 9-12; *see also* J.S. App. 14a (citing Meek testimony).

[4] Declaration of Stanley Besen, DAE Vol. VIII, Exh. E.

[5] Rebuttal Declaration of Jeffrey Rohlfs, DAE Vol. VIII, Exh. L, at ¶ 15.

[6] Meek Decl., DAE Vol. II.A, at ¶¶ 69-70.

- More than 100 individual examples of noncarriage or other adverse action, contained in materials submitted to Congress and/or the FCC.[7]

See J.S. App. 14a (citing expert testimony).

Considerable additional evidence supported this conclusion. For example, FCC Commissioner James Quello warned Congress that "[b]ecause the lack of [cable] carriage adversely affects the economic viability of local broadcast stations, the number of off-air signals available in a community may be reduced significantly in the near future."[8] A 1990 FCC report similarly cautioned that "[t]he strong localism and diversity in broadcast television service—positive forces that fifty years of regulatory policy under the Communications Act have sought to develop—will be jeopardized if this situation continues unaddressed."[9] Appellees' experts also submitted detailed analyses showing that a substantial segment of the broadcast industry would be at serious risk if cable noncarriage trends continued.[10] Based on that evidence, the court concluded it was reasonable for Congress to infer that significant numbers of broadcast stations would be denied carriage absent must-carry.

* *"Whether broadcasters so affected would suffer financial difficulties as a result"?*

The district court also found that the record contained substantial evidence supporting Congress' conclusion that stations denied carriage would suffer serious financial

[7] Joint Statement of the Congressional Record (JSCR) ¶¶ 317-467.

[8] *See* JSCR ¶ 584 (quoting Statement of James H. Quello).

[9] JSCR ¶ 544 (quoting FCC Report in MM Docket No. 89-600, FCC No. 90-276 at 78-79) (released July 31, 1990)).

[10] *See, e.g.*, Opposition of NAB and INTV to Plaintiffs' Motion for Summary Judgment (June 16, 1995) at 64 n.64, 67 n.70, 71 n.76 (citing relevant sources); DAE Vol. VIII, Exh. C at ¶¶ 2-9 (Rebuttal Declaration of Dr. Roger G. Noll); JSCR ¶¶ 535-588.

harm as a result. By 1992, cable households constituted more than 60 percent of all television households, and the record overwhelmingly demonstrated that stations denied access to those households would have difficulties securing financing, would suffer significant revenue reductions, would be unable to secure or finance quality programming, would have to reduce investment in equipment and staffing, and in some cases, would have to cease operation altogether. Even the cable industry's internal studies confirmed that a broadcast station's access to cable systems is "crucial" to the station's long-term viability. *Broadcast TV Study*, June 11, 1993, DAE Vol. II.A., Haring Decl. at Attachment B. Indeed, the cable industry did not even argue before Congress—let alone present any evidence—that a broadcast station could operate successfully without gaining access to cable television households. *See* J. S. App. 15a-18a (summarizing evidence).[11]

* *Whether the "actual effects of must-carry" imposed a substantial burden on cable operators and programmers, and specifically the "extent to which cable operators will in fact be forced to make changes" in their program selections, and the "degree to which cable programming will be dropped from cable systems to make room for local broadcasters"?*

Drawing largely on evidence submitted by appellants, the district court found that the actual impact of must-carry on the cable industry was minimal. Fewer than half of all cable operators were required to add *any* new broadcast stations, and those systems had to devote less than three percent of their capacity to added stations. The total cable channel capacity occupied by broadcast stations electing must-carry (including broadcasters cable operators were required to "add" *and* broadcasters cable

[11] *See, e.g.*, Memorandum of NAB and INTV in Support of Motion for Summary Judgment 54-66, 89-96 (May 26, 1995) (and sources cited therein); JSCR ¶¶ 589-911.

operators had already chosen to carry before the enactment of must-carry) is substantially less than 10 percent. Because the undisputed facts showed that cable's aggregate channel capacity is increasing by more than 10 percent per year, the maximum burden imposed by must-carry, the court found, is already very limited and is rapidly becoming even more insignificant. J.S. App. 18a-22a.

* *Whether less restrictive alternatives could have served Congress' interests as effectively as must-carry?*

The district court evaluated each of the regulatory alternatives proposed by appellants, and concluded that Congress acted reasonably in choosing must-carry instead of those alternatives. With respect to the A/B switch (which theoretically allows subscribers to switch back and forth between cable and over-the-air reception), the court pointed to substantial evidence submitted to Congress that this alternative was ineffective. Much of that evidence was generated by appellant NCTA itself, and included a study prepared by NCTA's Committee on Engineering. J.S. App. 24a. The court also found substantial evidence from which Congress could have concluded that neither the leased access regime proposed by Judge Williams in dissent, nor the so-called *Century* Rules, would adequately advance Congress' objectives. J.S. App. 22a, 26a. Instead, the court found, Congress could reasonably have concluded that neither of these options would provide adequate guarantees of carriage for the substantial numbers of local broadcasters likely to be denied access to cable, and neither would effectively protect the existing diversity of programming available to noncable households. J.S. App. 23a, 26a.

b. Judge Jackson joined Judge Sporkin's opinion. He agreed there was substantial evidence to support the congressional judgments underlying must-carry. His reluctance to grant summary judgment for either party was premised on his uncertainty concerning the proper task on remand. Insofar as he (incorrectly) read this

Court's opinion as a direction "to resolve any factual disputes remaining before passing upon the constitutional validity of the must-carry provisions" (J.S. App. 33a), he believed a trial would be needed because he was unable to reach "definite conclusions" regarding controverted facts. *Id.* However, insofar as he (correctly) read the Court's opinion as permitting summary judgment for the government so long as there was substantial evidence supporting Congress' judgments, without resolving additional factual disputes, he agreed with Judge Sporkin's analysis of the factual record. J.S. App. 37a.

c. Judge Williams dissented. The dissent did not take issue with the court's conclusion that there was substantial evidence showing that "significant numbers" of broadcast stations would be, and were already being, denied carriage absent must-carry. Instead, caricaturing Congress' interest as simply a "more is better" argument, the dissent contended that Congress' legitimate interest could extend no further than preventing the disappearance of broadcasting as a whole. J.S. App. 71a ("in the absence of a threat to broadcast's general viability *there is no other ground permitting government veto power over a cable operator's selection of services*") (emphasis added). Because the evidence did not support the conclusion that the "entire" broadcast industry would disappear without must-carry, Judge Williams concluded, must-carry was not reasonably necessary to advance the interest he ascribed to Congress. The dissent rejected as an insufficient justification for must-carry any interest Congress might have in preventing the disappearance of 20, 30, or even 40 percent of current broadcast diversity —notwithstanding this Court's prior ruling that this interest was substantial.

The dissent also challenged Congress' predictive judgments because aggregate evidence from the *decade* preceding passage of the 1992 Cable Act purportedly showed that broadcasting was healthy overall, and that the absence of must-carry during most of the 1985-1991 period

did not appear to have had devastating consequences for broadcasting as a whole. J.S. App. 48a. The dissent noted growth in broadcasting during this period, but did not mention that most of it occurred while FCC must-carry requirements were in place, nor explain the flattening of that growth in the years after those requirements were eliminated. The dissent similarly pointed to a general rise in broadcasting advertising revenues during the decade preceding enactment of must-carry. Although the dissent noted the substantial *decline* in broadcasting advertising revenues during the three years preceding enactment of must-carry, it attributed that decline entirely to a general economic recession, without explaining the dramatic rise in cable advertising revenues during this same period.

Having concluded—despite this Court's prior affirmation of the importance of that interest—that Congress lacked a substantial interest in protecting current levels of programming diversity for noncable households, the dissent did not evaluate whether appellants' proposed regulatory alternatives effectively served *that* purpose in a narrowly tailored manner. Instead, Judge Williams evaluated whether must-carry was an overbroad approach to furthering the different interest approved by the dissent—protection against anticompetitive exclusion of unaffiliated programming by cable monopolists—and concluded that must-carry was broader than necessary to serve *that* interest. J.S. App. 101a-102a.

ARGUMENT

This Court should summarily affirm the district court's decision upholding must-carry. The present appeal involves the straightforward application of settled legal principles. In the previous appeal, the Court resolved the only substantial legal issue presented in this case: whether must-carry is content-neutral legislation subject to the more lenient *O'Brien* standard. Appellants do not seek reconsideration of that ruling; their challenge

focuses entirely on the application of *O'Brien* to the trial record. The only issues remaining are whether must-carry furthers the interests already deemed substantial by this Court, and is reasonably tailored. These issues hinge on the adequacy of the factual record. Full review would require this Court to replicate the district court's painstaking review of that record.[12]

There is no need to do so. The district court's conclusion that substantial evidentiary support existed for the congressional judgments underlying must-carry is manifestly correct, as are the court's findings that must-carry's burden on cable operators and programmers is *de minimis* and diminishing, and that Congress acted reasonably in choosing must-carry instead of other less effective regulatory options.

As the district court noted, appellees:

> provided a slew of notable experts who testified to the reasonableness of Congress' conclusion that cable operators had and have substantial and increasing incentives to act adversely to local broadcast stations (Dr. Roger Noll, Dr. John Haring, Dr. James Dertouzos) and that the operators had acted and would act in accordance with those incentives in the absence of must-carry rules (Dr. John Haring, Tom Meek, Richard Feldman).

J.S. App. 14a (footnotes omitted). Had Congress received the conflicting sets of expert analyses submitted to

[12] Full briefing and argument is not required merely because the issues raised on appeal are important in the abstract. This Court routinely grants motions to affirm in cases raising issues of major legal and practical importance, where a three-judge district court has correctly applied the proper legal standard to a complex factual record. *E.g., Dewitt v. Wilson*, 115 S. Ct. 2637 (1995) (upholding constitutionality of California's congressional redistricting plan in case raising challenge under *Shaw v. Reno*, 113 S. Ct. 2816 (1993)); *Pope v. Blue*, 113 S. Ct. 30 (1992) (upholding constitutionality of North Carolina's state legislative redistricting plan in case raising challenge under *Davis v. Bandemer*, 476 U.S. 109 (1986)).

the district court, and decided to credit appellees' experts rather than appellants' experts, it is inconceivable that a reviewing court would conclude Congress lacked a substantial basis for concluding must-carry was needed. To do so, a court would have to supplant Congress' judgment based on a judicial preference for a different economic model.

That is precisely what appellants seek. Their principal arguments frankly ask this Court to replace Congress' judgments on matters of economic policy with judicial ones, and directly challenge the legitimacy of Congress' interest in protecting existing levels of broadcasting diversity for noncable households. Indeed, appellants' jurisdictional statement is a thinly disguised assault on the premises of *O'Brien* itself. While paying lip service to the need for deference in evaluating Congress' judgments, appellants seek to transform *O'Brien* review into strict scrutiny. They invite this substantial escalation of the standard of review because must-carry easily survives under the law as it now stands. This Court should decline appellants' invitation, for the result would be nothing less than full-blown economic substantive due process review in the guise of First Amendment analysis whenever a law incidentially burdens expression.

Appellant never come to grips with the actual interest Congress said it was advancing—"maintaining" the existing "multiplicity of information sources" for noncable households—and thus never address whether the record contains substantial evidence supporting Congress' judgment that this interest would be materially threatened absent must-carry. Instead, appellants argue that the record will not support an inference Congress never drew—*viz.* that the broadcast industry "as a whole" would collapse without must-carry. J.S. 7-8, 11-12.[13] Moreover, appel-

[13] There is a very great difference between maintaining existing levels of diversity (the interest Congress actually was pursuing), and advancing the interests of all broadcasters in all circumstances at any cost (the interest appellants ascribe to Congress). There is

lants take no account of the sweeping structural changes that were occurring that would dramatically increase cables' ability and incentives to act against broadcasters. Nor do they even attempt to grapple with the substantial evidence showing significant existing levels of noncarriage and repositioning that had already occurred, and the substantial resulting harms to the affected stations.

Because this Court has already held that Congress was pursuing an interest in "maintaining" existing levels of broadcasting diversity for noncable households—and there is ample evidence that must-carry was needed to do so—appellants are forced to challenge the substantiality of this interest. Appellants suggest that Congress might have had a legitimate interest in preventing local broadcast television from disappearing entirely, but argue that must-carry was not needed to protect that interest because the "mainstream" core of local broadcasting—essentially, the network affiliates—would be carried without must-carry. Thus, appellants claim, must-carry does nothing more than protect individual broadcasters and mar-

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nothing to the refrain repeated by appellants and the dissent that no remand would have been necessary had Congress' interest merely been to advance the interests of broadcasters generally. In the absence of district court findings, it was not clear whether Congress could reasonably have believed must-carry was necessary to maintain existing diversity. Whether such a threat existed, as this Court made clear, depended on whether there was a risk that "significant numbers" of broadcasters would be refused carriage absent must-carry. Under *O'Brien*, a review of the record is required to ensure that Congress has not acted on whim, *e.g.*, *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989), and that the record is not so utterly devoid of support for the legislature's action as to raise suspicion of hidden content-based motives, *e.g.*, *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987). In any event, arguments in the initial appeal focused almost exclusively on the issue of the proper standard of review. Thus, it was entirely appropriate for this Court to remand for application of the *O'Brien* standard, as clarified in the first appeal, rather than to seek to apply the standard to a voluminous record. And the district court had not examined other issues this Court deemed significant, such as the "actual effect" of must-carry on cable operators or programmers.

ginal, unworthy programming—a category including many non-commercial stations, unaffiliated commercial stations that serve particular audiences with foreign language or religious programming, or stations reaching a more general audience that are becoming the building blocks for new national networks, such as the Fox Network or the emerging UPN network. Appellants do not explain why Congress does not have a substantial interest in maintaining this broadcasting diversity for noncable households, except to intimate that they view diversity as not particularly valuable.

This Court, however, has already held that Congress' interest in maintaining local broadcast diversity is substantial. 114 S. Ct. 2469-70. Stripped to its essence, therefore, appellants' argument is based entirely on a disagreement with Congress' policy decision about how much broadcasting diversity should be preserved for noncable households, and this Court's prior decision validating that interest. Appellants believe preserving a mainstream core of network affiliates would suffice. Congress chose instead to seek to maintain the existing levels of diverse programming that had been achieved under the system of allocation of Section 307(b) of the Communications Act. Under *O'Brien*, however, the validity of a regulation "does not turn on a judge's agreement with the responsible decisionmaker concerning the . . . degree to which th[e government's] interests should be promoted." *Ward v. Rock Against Racism*, 491 U.S. 791, 800 (1989); *United States v. Albertini*, 472 U.S. 675, 689 (1985). Indeed, in challenging the substantiality of the interests underlying must-carry, appellants effectively seek to import a compelling interest standard into *O'Brien*. Under *O'Brien* and its progeny, appellants' argument raises no substantial question.

Appellants' arguments with respect to narrow tailoring would likewise deny Congress any meaningful degree of discretion in making content-neutral policy choices. Appellants forthrightly argue that *O'Brien* requires Congress to adopt the least restrictive means of

achieving its goals. *See* J.S. at 3-4. They specifically contend that *O'Brien* requires Congress to adopt regulatory alternatives that advance its objectives *less effectively* than must-carry, notwithstanding the insubstantial burden must-carry actually imposes on the cable industry. J.S. at 17.

That is not the law. The Court already made clear *in this case* that the "requirement of narrow tailoring is satisfied so long as [must-carry] . . . promotes a substantial government interest that would be achieved *less effectively* absent the regulation." *Turner*, 114 S. Ct. at 2469 (quotations omitted) (emphasis added). That rule has been settled for many years. *See Ward v. Rock Against Racism*, 491 U.S. at 801; *United States v. Albertini*, 472 U.S. at 689. There is no reason why the Court should reconsider that rule. Indeed, appellants' suggested rule would place goverment in a straitjacket whenever it acted in ways that incidentally burden expression.

Nor is there any substantial question (factual or legal) regarding the actual impact of must-carry on the cable industry. Although appellants point to approximately 5,000 instances of must-carry stations being added—and thus hypothesize a potential maximum of 5,000 instances of cable programmers who *may* have been denied carriage because of must-carry—their own expert claimed only 530 instances where cable programming services were dropped, for any reason.[14] In any event, even 5,000 instances would be an insubstantial fraction of cable's half-million aggregate channel capacity. J.S. App. 19a. In fact, however, most cable operators were not burdened at all, and those that were had to devote less than 3 percent of their channel capacity to stations added pursuant to must-carry. J.S. App. 20a-21a. Had this burden been any less, the First Amendment would not even have been implicated. J.S. App. 13a n.22.

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[14] J.S. App. 20a; Appendix to Reply Br. of NAB and INTV in Support of Defendants' Motions for Summary Judgment ¶ 16 (June 30, 1995).

I. THE DISTRICT COURT CORRECTLY HELD THAT THE RECORD CONTAINS SUBSTANTIAL EVIDENCE FROM WHICH CONGRESS COULD REASONABLY CONCLUDE THAT ABSENT MUST-CARRY SIGNIFICANT NUMBERS OF LOCAL BROADCAST STATIONS WOULD BE REFUSED CARRIAGE, AND THAT STATIONS SO AFFECTED WOULD SUFFER SERIOUS FINANCIAL HARM.

The record before the district court contained substantial evidence supporting the reasonableness of Congress' judgment that must-carry would directly further the substantial interests it is designed to further.

Based on the massive record before Congress and the testimony of appellees' experts, there can be no serious dispute that cable has become the dominant means of providing video programming to American households; that there is substantial and increasing vertical and horizontal integration in the cable industry; that cable operators have the incentive and the ability to use their dominant position in ways that could be harmful to competitors and the public interest; that advertising revenues had become an increasingly important revenue source for cable operators, and that cable's principal competitors for advertising revenues were local television broadcast stations.

To the extent there is any dispute, it is over the degree to which those structural realities translated into a substantial threat to the broadcast system—and to the extent of the threat necessary to justify imposition of must-carry requirements. Congress made the predictive judgment in 1992 that, if left unchecked, trends that were already detectable would accelerate, resulting in substantial erosion of both the quantity and quality of free over-the-air broadcast television, which would particularly harm the 40 percent of American households without cable. Appellants and the dissent below dispute that judgment, but do not seriously argue that broadcasters denied access to cable would suffer serious harm as a result. Rather, their position is that must-carry is not needed

because cable operators have sufficient economic incentives to carry enough local broadcasters. In other words, appellants argue that Congress misjudged the "likely impact" (*Turner*, 114 S. Ct. at 2471) of the structural realities and market trends.

This Court's prior decision established the framework for resolving this dispute. Congress' predictive judgments need not be correct, or even the most reasonable inferences to be drawn from the evidence. Applying *O'Brien*, a reviewing court "is not . . . to reweigh the evidence *de novo*, or to replace Congress' factual predictions with [its] own," and "must accord substantial deference" to Congress' judgments. 114 S. Ct. at 2471. Must-carry should be upheld so long as "in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." 114 S. Ct. at 2471.

Congress, of course, "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon an issue as complex and dynamic as that presented here." *Turner*, 114 S. Ct. at 2471 (quotations omitted); *accord Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985). Even more fundamentally, the requirement of deference restrains the judiciary's ability to second-guess the policy choices of the legislative branch. Aggressive judicial review of whether a law "furthers" Congress' purposes carries too great a risk of substituting the court's views about policy for those of Congress. *O'Brien* is not an invitation to engage in substantive due process review of the legislature's economic policy decisions.

That is particularly true where, as here, the policy choice rests on congressional predictions about a complex and dynamic industry. The Court recognized that Congress was attempting "to forecast *future* events and to anticipate the *likely impact* of these events based on deductions and inferences for which complete empirical support may be unavailable.' 114 S. Ct. at 2471 (emphasis

added). Appellants and the dissent below evaluate the record before Congress, and the findings Congress made, as if Congress were simply viewing a "snap shot" of the broadcast and cable industries, and making *historical* findings of fact. Instead, however, Congress was viewing an on-going "motion picture" of those industries, and was making *predictive* judgments about the future. There is a critical difference between investigating a frozen past, and predicting the complex interactions of rapidly changing industries. *See FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 813 (1978); *Columbia Broadcasting Systems, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 102-03 (1973).

A proper application of these standards vindicates the district court's ruling. As demonstrated, the record before the district court amply supports the reasonableness of Congress' predictions that absent must-carry "significant numbers of broadcast stations will be refused carriage on cable systems," and that "broadcasters *so affected* would suffer financial difficulties as a result" *Turner*, 114 S. Ct. at 2471-72. (*See* pages 6-9 *supra*). There is simply no need for full briefing and argument on this issue.

Because the record provides such strong support for the reasonableness of the congressional judgment that significant numbers of broadcasters would be seriously harmed in the absence of must-carry—thereby materially harming the broadcasting system as it existed in 1992—appellants (following Judge Williams) have sought to redefine Congress' objectives. Isolating the phrase "broadcast system as a whole" in both the legislative findings and this Court's prior opinion, appellants contend that Congress enacted must-carry *only* because it believed broadcasting faced extinction as a result of competition from cable, and feared disappearance of the "whole" broadcasting system. Appellants then argue that the record does not support such an inference because a core of healthy broadcast stations would remain, and Congress

therefore lacked a substantial foundation in fact for imposing carriage requirements on cable.

To support this argument, appellants adopt the economic analysis set forth in Judge Williams' dissent, which concluded that Congress erred because the absence of must-carry during the period preceding enactment of the Cable Act did not appear to have driven broadcasting to the brink of disaster. In Judge Williams' view, it did not matter whether "significant numbers" of broadcast stations would be denied carriage absent must-carry, or whether stations denied carriage would be materially impaired, because the demise of the broadcast system "as a whole" could not reasonably have been predicted on the basis of market conditions as of 1992. J.S. App. 48a-49a.

Appellants' position provides no justification for full briefing and argument. To begin with, the objective appellants claim Congress was pursuing (preserving broadcasting from extinction) is not the interest Congress said it was pursuing. Congress' goal, as this Court expressly recognized, was "maintaining the local broadcasting structure" in order to preserve the level of broadcasting diversity established through the "system of allocation" established by Section 307 of the Communications Act. 114 S. Ct. at 2469. Congress sought to "*preserve the existing structure* of the Nation's broadcast television medium," *id.* at 2464 (emphasis added), in order to ensure that noncable households would continue to have access to "a multiplicity of information sources." *Id.* at 2470.

The existence of the Cable Act's retransmission consent provision, 47 U.S.C. § 325(b), confirms this conclusion, and is fatal to appellants' "entire industry" argument. Opting for retransmission consent places a broadcaster at risk of being denied carriage should negotiations with the cable operator be unsuccessful. Thus, only broadcasters confident of voluntary carriage will opt for retransmission consent. Because Congress expected some number of broadcasters to choose retransmission consent,

Congress obviously believed those broadcasters could survive without a compulsory carriage requirement. Must-carry was not intended to protect those broadcasters, but to protect the remaining broadcasters, who could not confidently rely on voluntary carriage. In light of the retransmission consent provision, it makes no sense to attribute to Congress the belief that the "entire" broadcast industry would collapse without must-carry.

The legislative history likewise makes clear that Congress' principal objective was maintaining the local broadcasting structure as it existed in 1992. The Conference Report specifically identified Congress' intent to "protect the federal system of television allocations." 138 Cong. Rec. H8327 (daily ed. Sept. 14, 1992). The House Committee Report likewise concluded there was "ample evidence that *some* cable systems will refuse to carry the signals of local broadcast stations, and that such refusal poses a grave threat to the *allocation system* . . . established by Congress and the FCC." H.R. Rep. No. 628, 102d Cong., 1st Sess. 67 (June 29, 1992); CR Vol. I. A, Exh. 4, CR 00431 (emphasis added). As this report explained, Congress' goal was "ensuring that [the] local broadcast system which has served the public interest will continue to thrive and that a broad array of views and programs from diverse, competitive and antagonistic sources is available to all television households, whether or not they subscribe to cable service." H.R. Rep. No. 628, at 67.

The principal interest actually identified by Congress—preserving the existing local broadcast structure to ensure a multiplicity of diverse programming sources for the 40 percent of households without cable—is plainly substantial in its own right. Indeed, the Court has already acknowledged that it is "of the highest order," for "it has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is

essential to the welfare of the public." 114 S. Ct. at 2470 (quotations omitted). This Court's remand instructions likewise pointedly asked the district court to determine whether Congress reasonably concluded, *not* that the entire broadcasting industry would disappear absent must carry, but that "*significant numbers* of broadcast stations would be refused carriage on cable systems, and that those stations would "deteriorate to a substantial degree or fail altogether." 114 S. Ct. at 2471-72 (emphasis added). The clear import of these instructions is that jeopardy to "significant numbers" of broadcast stations would threaten Congress' policy goals, even if the "entire" industry would not be in jeopardy.

Must-carry does not guarantee the survival of all broadcast stations. Stations must still attract viewers to generate advertising revenues sufficient to sustain themselves. But must-carry does provide an opportunity for diverse local programming to survive and flourish—an opportunity that would otherwise be extinguished for many broadcasters unable to obtain access to cable. Must-carry increases the likelihood that noncable households will continue to have access to at least some fraction of the programming diversity available to those who can afford cable—religious stations, foreign language stations, educational programming, and other services that serve specialized needs. It is also more likely that additional broadcast networks will develop, thus further enriching the options for noncable households—as the experience of the emerging UPN network aptly shows. This interest in "maintaining" the existing diversity of broadcasting sources is obviously threatened if "significant numbers" of broadcast stations are denied access to cable.

Appellants nonetheless argue that because 60 to 70 percent of broadcast stations would be carried voluntarily (at least as of 1992), there would be enough diversity of programming for noncable households, even if their programming choices would be materially diminished, be-

cause the stations that would not be carried are outside the "mainstream of broadcast television."[15] Appellants' argument is thus based on a disagreement with Congress about the appropriate degree of programming diversity that should be afforded to noncable households. Appellants believe the public would have been adequately served by the substantially reduced degree of diversity that would remain absent must-carry. But that disagreement with Congress' judgment about the extent to which a particular interest should be advanced is manifestly not a sufficient reason to overturn a law under *OBrien*.[16]

The dissent's analysis does not survive scrutiny even on its own terms. It completely disregards this Court's instruction to defer to congressional judgments whenever they are supported by substantial evidence, stating instead that this Court's remand contained "instructions to *resolve* a variety of factual issues." J.S. App. 39a (emphasis added). The dissent takes no account of the predictive nature of those judgments, focusing entirely on the 12-year period *preceding* passage of the Cable Act.

Moreover, the true import of the evidence on which the dissent placed so much reliance is that, to an overwhelming degree, the growth of broadcasting occurred while FCC-promulgated must-carry requirements were in effect. Although that growth continued for a very short period immediately following judicial invalidation of the FCC's must-carry rule in 1985, that last increment of growth was very likely the result of investment and business planning decisions predating invalidation of must-carry. Once expectations had adjusted to the absence of must-carry, station growth flattened markedly. And the principal source of broadcasting revenue—advertising—

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[15] *See* Appellant Time Warner's Memorandum In Support of Motion for Summary Judgment, at 7.

[16] *Ward*, 491 U.S. at 800; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984); *Albertini*, 472 U.S. at 689.

declined, while cable advertising revenue rose sharply. J.S. App. 51a-52a.[17]

The dissent concludes that this decline in broadcast advertising revenues cannot justify congressional concern about the health of broadcast stations because the decline could be fully explained as the product of an overall economic recession, and was thus not attributable even in part to increasing competition from cable. Yet the very graph used to make this point confirms a substantial and accelerating *increase* in cable advertising revenues during the same recessionary period. J.S. App. 52a. Were general economic conditions wholly to blame for broadcast's absolute decline in revenues, one would expect a proportionately similar decline in cable advertising revenues. Cable's accelerating revenue increase during this period—which Judge Williams does not even try to explain—substantially undermines the dissent's speculative conclusions, and strongly supports Congress' judgment.

Moreover, in evaluating whether local broadcast stations would be harmed in the absence of must-carry, Judge Williams explicitly declined even to consider some of the most palpable evidence of harm, reasoning that "the intuitive obviousness" of those harms "precludes the possibility that the Court remanded the case to us to discover them." J.S. App. 63a.[17] The question, however, is whether *Congress* had substantial reasons for enacting must-carry, and it was plainly appropriate for *Congress* to consider "intuitively obvious" harms to local broadcast stations in deciding whether must-carry was needed. But because Judge Williams did not consider those "obvious" harms, his conclusion that must-carry was not needed

[17] The dissent is forced to acknowledge that "[a]fter a rise in the early '80s," when FCC must-carry rules were in effect, broadcast's "gross revenues were more or less flat from 1986" onward, when must-carry rules were *not* in effect, and actually *declined* by $2.9 billion from 1988-1991. J.S. App. 51a-52a.

utterly failed to account for some of the most important, though obvious, evidence that Congress did consider.[18]

II. THE DISTRICT COURT CORRECTLY HELD THAT MUST-CARRY IS NARROWLY TAILORED BECAUSE ITS ACTUAL EFFECTS ON CABLE PROGRAMMERS AND OPERATORS ARE *DE MINIMIS* AND DIMINISHING, AND CONGRESS REASONABLY CHOSE MUST-CARRY RATHER THAN LESS EFFECTIVE REGULATORY OPTIONS.

The district court's analysis of must-carry's "fit" with Congress' objectives likewise raises no issue deserving plenary review. The controlling law on this question is settled. A law is not "invalid simply because there is some imaginable alternative that might be less burden-

[18] In sharp contrast, when Judge Williams evaluated the harm to the *cable* industry occasioned by must-carry, he relied heavily on "intuitively obvious" harms. He noted, for example, that even if a cable programmer that is not *added* to a cable system cannot prove it would have been added in the absence of must-carry, that programmer's decreased opportunity to gain carriage "is no less a real manifestation of the effects of must-carry," because "any station carried involuntarily blocks the cable operator's intended use of the channel, forcing it to make changes in its anticipated, if not current, programming selections." J.S. App. 91a, 94a. Of course, it is obvious, as this Court observed, that the must-carry "rules reduce the number of channels over which cable operators exercise unfettered control, and they render it more difficult for cable programmers to compete for carriage on the limited channels remaining." *Turner*, 114 S. Ct. at 2456. The fact that no remand was necessary to "discover" that largely theoretical harm did not dissuade Judge Williams from relying on that harm in concluding there was significant harm to cable. Indeed, he had no choice, because on the questions the lower court was explicitly instructed to consider, the "actual effects" of must-carry (*i.e.*, "the extent to which cable operators will, *in fact*, be forced to make changes," and "the degree to which cable programmers will be *dropped* from cable systems to make room for local broadcasters") (114 S. Ct. at 2472 (emphasis added)), the evidence, even from appellants' experts, showed that the harm to cable was *de minimis* and diminishing. *See* 28-29 *infra*.

some on speech." *Albertini*, 472 U.S. at 689. A law burdens "substantially more speech than is necessary to further the government's legitimate interests" under *O'Brien*, *see Turner*, 114 S. Ct. at 2470, *only* when "a substantial portion of the burden on speech does not serve to advance" the government's interests. *Ward*, 491 U.S. at 799; *Simon & Schuster v. Members of N.Y. State Crime Victims Bd.*, 112 S. Ct. 501, 511 n. ** (1991). *See also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). *O'Brien* leaves the political branches of government with substantial latitude to choose among competing regulatory options, and reviewing courts should be "loath to second-guess the Government's judgment." *Board of Trustees v. Fox*, 492 U.S. 469, 478 (1989). Judicial disagreement with "the responsible decisionmaker concerning the most appropriate method" cannot be grounds for invalidation under *O'Brien*. *See Albertini*, 472 U.S. at 689; *Community for Creative Non-Violence*, 468 U.S. at 299; *Ward*, 491 U.S. at 800.

Appellants argue that this case presents a substantial legal question about the "less restrictive alternative" analysis under intermediate scrutiny, and contend the district court erred in rejecting appellants' proposed regulatory alternatives because they were "less effective" than must-carry in advancing the congressional objectives. J.S. at 16. Yet the district court did no more than follow clearly established law. "An incidental burden on speech is . . . permissible under *O'Brien*," if it "promotes a substantial government interest that would be achieved *less effectively* absent the regulation." *Albertini*, 472 U.S. at 689 (emphasis added); *accord Ward*, 491 U.S. at 801. Indeed, that is precisely the standard this Court directed the district court to apply on remand. *See Turner*, 114 S. Ct. at 2469 (quoting *Ward* and *Albertini*). Appellants concede that none of the regulatory alternatives they have advanced—the A/B switch, leased access, or the so-called *Century* Rules—advances Congress' objectives as effectively as must-carry. Thus, there is no substantial question with respect to this issue.

The A/B switch. Appellants' (and the dissent's) cavalier attitude toward Congress' judgments is perhaps most evident in its treatment of whether the A/B switch was a less restrictive alternative to must-carry. Based solely on anecdotal evidence involving a brief episode in a single city, as well as an intuitive assessment that the sole problem with A/B switches is that they create an "occasional need to 'get up,' " the dissent concluded that this approach would be preferable to must-carry. J.S. App. 106a. Congress, however, specifically studied the feasibility of the A/B switch as an alternative to must-carry, and rejected it as inadequate on the basis of substantial testimony and empirical analysis—including testimony from appellant NCTA that the A/B switch was technically and economically infeasible. *See* J.S. App. 24a (summarizing evidence).

Leased Access. Congress likewise had substantial reason to reject the dissent's preferred regulatory option—a leased access regime. Such an approach, which would set aside a fixed proportion of channels for access by unaffiliated programmers (cable and broadcasting alike), is both more intrusive and less effective in achieving the congressional objectives. Leased access is more intrusive because it sets aside channels regardless of whether they are needed to address the concerns Congress identified. Leased access is less effective because granting access to unaffiliated *cable* programmers will not maintain the existing system of local broadcast television for those without cable. Furthermore, Congress had ample experience with leased access under the 1984 Cable Act, and was thus in a position to evaluate its efficacy as an alternative to must-carry.

The Century Rules. It is undisputed that the *Century* Rules—the very limited must-carry regime put in place by the FCC in 1987 after its longstanding must-carry rules had been invalidated—would protect only a small fraction (14 percent) of the local broacasters protected

by the must-carry provisions of the Act.[19] That alone suffices to validate Congress' judgment. Furthermore, because the *Century* Rules imposed a minimum viewing threshold for must-carry status, they did not protect the broadcast stations most in need of protection. Indeed, appellant Turner Broadcasting Systems opposed their initial adoption by the FCC for precisely this reason.[20]

Nor is any substantial question raised by the district court's finding that must-carry's actual impact on cable programmers and cable operators is *de minimis* and diminishing. For example, *appellants'* expert demonstrated (and the court below found) "that only 1.2 percent of the cable channel capacity is occupied by broadcast stations added to cable systems as a result of the must-carry rules," and that "only 640 out of 11,628 cable systems" had to drop even a *single* programming service—cable or broadcast—because of broadcast stations added pursuant to must-carry. J.S. App. 19a, 20a. This means that even after enactment of the must-carry requirement, cable operators were able to continue to carry *more than 99.8 percent* of the programming choices they had previously made a voluntary editorial judgment to carry.[21] And *all* of the cable programmer appellants experienced significant *increases* in carriage and subscribership since enactment of the must-carry provisions; none of those cable programmers even claimed they had been subjected to

[19] In the district court, appellant Turner Broadcasting Systems argued that "86% of the must carry broadcast stations that were added under the Cable Act rules would not have been required to be added under the *Century* rules." Memorandum of Law in Support of Summary Judgment of Turner Broadcasting Systems, Inc. at 55.

[20] Petition for Reconsideration filed by Turner Broadcasting Systems, Inc. in MM Docket No. 85-349 at 18 (Jan. 12, 1987).

[21] *See* Reply Br. of NAB and INTV in Support of Defendants' motions for Summary Judgment, Exh. A, para. 15 (using figures from appellants' expert).

adverse action on even one percent of the cable systems on which they were carried.[22]

As the district court found, these burdens were both *de minimis* and diminishing. J.S. App. 20a-21a. Indeed, the growth in channel capacity every *twenty-six days* is equivalent to the *total* channel capacity that has been used for broadcast stations added pursuant to the must-carry requirements.[23] Thus, in less time than it took to prepare this motion to affirm, cable's channel capacity increased enough to accommodate *all* of the local broadcast stations cable operators were "forced" to add as a result of must-carry. That undisputed fact alone provides a full response to the dissent's point that some 50% of cable systems were at full capacity in 1992.[24] As the district court concluded, "if the burden to the cable industry were much smaller, then the first amendment would not even be implicated." J.S. App. 13a n.22; *see also* J.S. App. 33a (Jackson, J., concurring) (accepting "as minimal the burden must-carry imposes on the cable industry's First Amendment rights").

[22] Reply Br. of NAB and INTV, *supra*. Exh. A, paras. 27-30 (using *claims* of adverse action made by plaintiff programmers).

[23] Reply Br. of NAB and INTV, *supra*, Exh. A, para. 41, and sources cited therein.

[24] Even if true, that fact is far less significant than the dissent suggests. Like every retailer, cable systems seek to avoid empty "shelf space." But that tells one very little about the relative preferences of cable operators. It does not mean that those operators would otherwise be unable or unwilling to add new cable programming.

CONCLUSION

The judgment of the district court holding that the must-carry provisions of the Cable Act satisfy the *O'Brien* test should be summarily affirmed.

Respectfully submitted,

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